No. 85-2067

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND ANGEL LANDEROS-QUINONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2067

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND ANGEL LANDEROS-QUINONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondents do not seriously dispute our contention that the question presented in this case is one of great importance to the administration of the immigration laws. Nor do respondents dispute, as the court of appeals here acknowledged (Pet. App. 3a), that the circuits are badly split on the issue: three circuits do not permit collateral attacks on the validity of deportation proceedings in prosecutions under 8 U.S.C. 1326, while four circuits permit collateral attacks in some circumstances (Pet. App. 3a). Instead, respondents contend that review is not warranted because the court of appeals here decided the issue correctly. Although that is not a sufficient ground for this Court to deny certiorari, we reply briefly to the points raised by respondents.

Respondents contend (Br. in Opp. 6) that the language of 8 U.S.C. 1105a provides "little support" for our argument that collateral attacks on the validity of deportation proceedings should not be permitted in prosecutions under

Section 1326. They argue that Section 1105a "is the civil deportation review statute, and applies only to aliens still empowered to raise civil attacks by their continuing presence in the United States" (Br. in Opp. 6). To the contrary, Section 1105a clearly provides that it is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Furthermore, contrary to respondents' suggestion that Section 1105a somehow does not apply to criminal proceedings, Section 1105a(a)(6) provides that an alien who fails to depart may collaterally attack the validity of his deportation order in a prosecution under 8 U.S.C. 1252(d) for failure to depart after being ordered to do so. That provision makes it clear that when it enacted Section 1105a, Congress had in mind the question whether collateral attacks on the validity of deportation orders should be permitted in a defense to criminal charges. By providing that the methods listed in Section 1105a are the "sole and exclusive" procedures for obtaining judicial review of deportation orders, Congress apparently intended not to permit such attacks in other settings, such as cases involving aliens who were deported and then reentered the United States without the permission of the Attorney General.

Relying primarily on the dissenting opinion in *United States* v. *Spector*, 343 U.S. 169 (1952), respondents suggest that due process requires that they be permitted to collaterally attack the validity of their deportation orders. As we noted in our petition, this Court stated in *Yakus* v. *United States*, 321 U.S. 414, 444 (1944), that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Respondents distinguish *Yakus* (Br. in Opp. 5-6) by noting that it involved an exercise of rulemaking rather than adjudicative power. While that is so, it does not change

the essential point, which is that Congress can constitutionally permit a jury to rely on the fact that a prior adminstrative order was violated, rather than requiring a review of the administrative proceeding as part of the criminal prosecution.

Contrary to respondents' contention (Br. in Opp. 5), nothing in *Estep* v. *United States*, 327 U.S. 114 (1946), supports their argument on this point. The Court in *Estep* stressed that the criminal statute at issue was silent as to whether courts were to review the adminstrative action underlying the prosecution (*id.* at 119), and concluded that Congress intended that defendants should be permitted to attack the underlying administrative action (*id.* at 121). Here, by contrast, Congress was not silent and plainly intended to make criminal the act of reentering the United States following a deportation.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986